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Ann Goode
Director
Office of Civil Rights
US EPA (1201A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Ms. Goode:

Please find enclosed the comments of Shintech Incorporated on EPA's Title VI Draft Investigative Guidance. We appreciate EPA's efforts in providing the opportunity for all interested stakeholders to review and comment on the Draft Guidance prior to final publication in the Federal Register.

COMMENTS OF SHINTECH INCORPORATED ON U.S. EPA's TITLE VI DRAFT INVESTIGATIVE GUIDANCE

These comments are being submitted to the U.S. Environmental Protection Agency (EPA) on behalf of Shintech Incorporated (Shintech) of Houston, TX. Shintech is a chemical manufacturing company which has been involved in and impacted by issues related to Title VI of the Civil Rights Act of 1964 and environmental justice while attempting to site proposed facilities in the State of Louisiana. As a result of its experiences in Louisiana, Shintech has a greater sensitivity to the issues of siting industrial facilities and state permitting decisions as they effect local communities and the environment.

NOTIFICATION AND TIMING CONCERNS

The Guidance should not involve excessive delays. Aggrieved parties may have a window of 180 days to file a Title VI complaint with EPA from the time of the aggrieved act. EPA then has 5 days to acknowledge receipt of the complaint, after which it has 20 days to determine whether to accept the complaint. If the complaint lacks sufficient information, EPA may request clarification from complainant by a date to be determined, presumably based on the amount of information that is requested. EPA would then have 20 days to determine whether to accept, reject, or refer the allegation based upon the clarifying information. EPA then has 180 days from commencement of the investigation phase to notify the recipient of its preliminary findings. (Discussed in Sections I-V).

EPA's proposed Title VI complaint process is a lengthy one. Additional hardships to the parties include the discretionary period of time given complainants to comply with EPA's clarification requests, the lack of notice to the parties indicating the commencement date of the investigation and the good faith waiver complainants may exercise to avoid the 180 day filing requirement. In its current form, the process causes uncertainty to the parties regarding final resolution of the issue. During this time period, the recipient may be forced to suspend operations to await final resolution of the issue. The issue could span over a year before EPA even reaches a preliminary finding. Additionally, EPA has a backlog of Title VI complaints. Thus, not resolving issues raised in a timely fashion would unfairly impose severe hardships on those facilities attempting to site new facilities or obtain permits.

1. **Response deadlines to EPA information requests should not be discretionary.**

   During the "Acceptance Phase" of the Complaint process, EPA would contact the complainant for clarification where the complaint lacked sufficient information to make an acceptance determination and include a discretionary deadline. (Discussed in Sections IIA(2) and IIIA).

Issue: Discretionary deadlines for complainant responses increases the uncertainty related to finite time frames for final resolution of complaints. In addition, the exercise of such discretion by the agency potentially causes lack of faith and confidence in the impartiality of the process.

Recommendation: The Guidance should include case-specific deadlines for receiving complainant's responses to EPA clarification requests. These pre-determined deadlines would be identified in the Guidance and would be determined by the nature and amount of information requested. EPA should also include a maximum time frame for response regardless of nature and amount of the request.

Additionally, EPA should also send copies of its information request to all parties involved in the complaint. Such procedural safeguards provide a greater indication to the parties and other stakeholders of an estimated time frame for complaint resolution. Published time frames also ensures the integrity of the entire process through pre-established time frames that are imposed on all parties.

2. **EPA's rejection of complaints based on complainant's untimely response should not be discretionary.**

During the "Acceptance Phase" of the Complaint process, EPA would have the option of rejecting those allegations for which complainant has failed to timely respond to clarification requests. [Discussed in Section IIA(2)].

Issue: The Title VI complaint process is a lengthy process which could span over a time period of up to a year or more to resolve. According to the Draft Guidance, complainants have six months from the date of the violation to file a complaint. EPA, must then make a determination of acceptance, after which the Agency has 180 days from commencement of the investigation to issue its preliminary findings. Late responses to EPA information requests have the effect of prolonging an already lengthy process causing uncertainty for the parties. It also has the effect of adversely impacting the economic interests of other stakeholders whose permitting plans may be delayed.

Recommendation: It is recommended that EPA impose a non-discretionary per se rule of rejecting complaints where complainants fail to provide timely response to EPA's requests. This will provide an incentive for complainants to file timely responses, thus ensuring that the time frame for resolving complaints is minimized. In consideration of the span of time required for processing complaints, EPA should ensure that the process for resolving complaints is swift and efficient while maintaining fairness to all parties involved. Discretionary time periods cause uncertainty in and prolong the process, thus reducing the confidence of the parties as well as other stakeholders in the time frame for complaint resolution and in the integrity of the process itself.

3. **EPA's process does not provide for notification of the parties upon commencement of the investigation.**

During the "Investigation Phase" EPA proposes to notify the recipient of its preliminary findings within 180 days of initiating its investigation. [Discussed briefly in Section IIA(3)].

Issue: Notwithstanding the length of the investigation period, the Draft Guidance provides no indication that the parties will be notified of the commencement date for the investigation period. Thus, although parties are notified of preliminary findings at the end of the investigation, without notification of its commencement, they are unable to independently monitor the amount of time required to complete the investigation.

Recommendation: In consideration of the total time required for processing complaints, EPA should ensure that the process for resolving complaints is swift and efficient while maintaining fairness to all parties involved. Failure to provide parties with notice of specific time frames prolongs the process, imposes a level of uncertainty due to the inability to estimate the conclusion of the process and reduces the confidence of the recipient as well as other stakeholders in the integrity of the process.

Thus, in addition to the notice of its preliminary findings, the Draft Guidance, EPA's process should also provide the parties with notice of the date of the commencement of the investigation.

ENSURING FINAL RESOLUTION OF COMPLAINTS THROUGH THE ADMINISTRATIVE PROCESS

The Guidance does not encourage complainants to resolve complaints through the administrative process. The failure of the draft guidance to provide a right of appeal, its failure to include all parties in the informal resolution discussions and its failure to include the permittee stakeholder in the complaint process provides little incentive for parties to pursue their claims through EPA's Office of Civil Rights. The rights of parties will receive inadequate protection, additionally, EPA may be unable to provide the type of relief sought by the parties. Thus, the parties may consider it more practicable and feasible to address their claims through the courts. This is not be in the best interests of EPA, the parties or other stakeholders in resolving equity issues in the environmental arena.

4. **The Draft Guidance does not provide a right of appeal for complainant in the Title VI regulatory process.**

"In addition, because the Title VI administrative process is not an adversarial one between the complainant and recipient, there are no appeal rights for the complainant built into EPA's Title VI regulatory process." [Discussed Draft Revised Investigative Guidance, Section IIB(2)].

Issue: The failure of the Draft Guidance to include a right of administrative appeal for complainants is a disincentive for complainants to resolve their claims through the Title VI administrative proceedings and makes resolution through the courts an attractive alternative for potential complainants.

As noted above, because complainants may view this process as lacking adequate procedures to protect their rights and interests, complainants may chose to resolve their claims in courts of law. Many community groups are turning to non-profit legal groups that are sophisticated in the issues to provide pro bono legal assistance, thus the financial bar to seeking relief in the courts has become less of a concern. Due to the lengthy time period involved in resolving disputes through the judicial system, and the litigation costs which are borne by all parties, the court system remains a costly alternative for the parties and other stakeholders.

Recommendation: Therefore, EPA should provide a right of appeal for complainants. First, complainants are afforded the same rights in the process as the recipient. Second, it ensures that disputes remain at the administrative level where the parties may avail themselves of the informal resolution process. Thus, the administrative process remains a viable alternative to the court system as the dispute may be resolved in less time than proceeding through the courts and yields a net savings to all parties (including EPA) in use of human and financial resources.

5. **The Guidance does not include all parties during informal resolution.**

EPA proposes to pursue informal resolution directly with the recipient as an alternative or in addition to resolving through the complaint process. (Discussed on Section IIB(2), IVA(2).

Issue: Notwithstanding EPA's position of neutrality in the complaint process, failure of EPA to include the complainant does not provide a completely open environment conducive to full airing of all issues and concerns. Thus, complainants may believe their concerns have been inadequately addressed and as a result, may seek to bring additional complaints for EPA resolution causing an additional drain on over-tasked EPA resources.

Additionally, complainants will undoubtedly view EPA's ex parte negotiations with recipient as inadequate protection of their rights. Thus, complainants may opt to pursue their claims in judicial courts which involve great expense and inevitably will result in long delays in resolving the issue, and also imposes the unnecessary adversarial element in the equation making resolution that much more difficult whether in the short term or in the long term after completion of any lawsuit. No stakeholder interests (including those of the federal government) are served by excluding complainants from the informal resolution process.

Recommendation: Complainant should have a role in the informal resolution process. As noted above, through the Draft Guidance, EPA should ensure that the process for resolving

complaints is swift and efficient while maintaining fairness to all parties involved. This result is not achieved if one party is excluded from the resolution process; nor is it served if complainants seek the court system as venue to have its claims resolved. Judicial remedies will result in time delays and potentially exorbitant litigation fees for all parties. In addition, it ensures that the issues and concerns of all parties to the process are explored and considered prior to any settlement agreement.

6. **The Guidance does not provide a formal role for the permittee stakeholder in the complaint process.**

EPA notes that permit denial may not necessarily be the appropriate solution. (Discussed Sections IVB and VIIA(3)).

EPA proposes a number of impact reduction measures during the informal resolution process to include additional pollution controls, offsets, and emergency planning and response. [Discussed in Section IVB].

Issue: EPA notes that the Draft Investigative Guidance primarily addresses permitting decisions and actions by recipients. It also notes that permit denial may not necessarily be the appropriate solution. Thus, it could be inferred that EPA could exercise such remedial action assuming it currently has the authority to institute it. Although EPA may ultimately decide to deny the permit, its complaint process fails to provide a formal role for the permittee stakeholder in the complaint process, effectively denying all stakeholders the opportunity to ensure adequate protection of their interests. This is an untenable result because EPA's actions could have an adverse impact on the permittee's ability to conduct its business.

Additionally, EPA could negotiate an informal resolution which would result in the imposition of any one or a number of impact reduction measures on the permittee stakeholder. As noted above, the permittee stakeholder has no formal role in the complaint process. None of the parties to the complaint can adequately protect its interests and legal rights. Therefore, punitive measures could be imposed without the permittee stakeholder ever having the opportunity to adequately protect its interests through negotiations with the appropriate parties.

Last, if Title VI complaints result in settlements or orders which may impair permitting interests including permit revocation or additional offset projects, permittees may seek redress in the courts.

Recommendation: Where the complaint either directly or indirectly involves the allegations against a permittee, the Draft Guidance should provide that the permittee shall become a party to the complaint process. This ensures where potential settlements affect permits or permit applications, the permittee is afforded the opportunity to protect its interests through

notification of all administrative actions during the complaint process, through participation in any informal resolution discussions and being the afforded the same opportunities as recipients to respond upon preliminary findings of adverse disparate impacts.

Additionally, providing a formal role for permittees in the process provides great assurances that disputes may be settled through the administrative process and are not removed to the courts for resolution which results in additional time delays, expense, and may not result in a amicable resolution to the satisfaction of all parties.

INHERENT FAIRNESS OF THE PROCESS

There are various provisions within the Draft Investigative Guidance where administrative actions of EPA during the process which have unjust results. The Draft Guidance has a number of provisions which allow EPA to exercise discretion to reject complaints, yet continue to hold recipients potentially responsible for allegations in the complaint. In addition, the Draft Guidance would impose penalties and other punitive measures during the informal resolution process prior to any formal finding of noncompliance with Title VI. Next, the Draft Guidance proposes to consider unregulated sources as part of its cumulative adverse impact analysis, although recipients have no authority over these pollutant sources.

7. **Administrative action against the recipient should end once EPA rejects a complaint.**

EPA retains the right to investigate an allegation contained in an untimely filed complaint, notwithstanding its rejection by EPA. [Discussed Section IIIB(1)].

Issue: EPA, in effect, engages in a circular argument by exercising its authority to reject the complaint, yet reserving a right to investigate the issue raised in the complaint. This raises a number of issues. First, because EPA may consider complaints, notwithstanding their untimeliness, complainants will have no incentive to file complaints in a timely manner. Thus, complainants purposely may file their complaints well after becoming aware of an alleged violation, but would have no impetus to file a complaint within the statutory 180 day deadline with the understanding that EPA would investigate the matter notwithstanding.

Additionally, with the understanding that EPA retains the authority to investigate certain allegations notwithstanding their untimeliness, potential unfounded complaints could be filed for purposes of forestalling permit-related actions of recipients and permittee stakeholders. Since the Acceptance phase does not determine whether the complainant has filed a meritorious allegation, EPA would not determine the sufficiency of the allegation until after an investigation or compliance review has been initiated. Thus, certain facilities could become the target of an EPA compliance review at any point in the future based on groundless and untimely claims filed by the complainant.

Recommendation: Thus, to ensure timely filing of complaints by complainants and to avoid unnecessary delays in the complaint process, the final Investigative Guidance should provide that EPA would not seek to investigate allegations from untimely complaints. It also injects the process with a greater degree of certainty of final resolution and helps to ensure that the impartial role of EPA during the complaint process is maintained.

8. **Administrative action against the recipient should end once EPA rejects a complaint.**

EPA retains the right to conduct a "compliance review" notwithstanding a decrease in stressor levels. [Discussed Section VIB(1)(a)].

Issue: In the Draft Guidance, EPA notes that evidence of decreases in stressor levels is potential grounds for dismissal of the complaint. EPA also reserves the right to conduct a "compliance review" at any point in the future. First, EPA currently maintains the regulatory authority to conduct compliance reviews regardless of whether a complaint has been filed. If what EPA proposes here is a restatement of that authority, then there is no issue.

However, as may be inferred by the Draft Guidance, it would seem EPA is grasping at a related, but different issue. It would seem that EPA is stating that notwithstanding the rejection of complaints due to decreases in stressor levels, those recipients who have been the subject of a complaint, will be placed on what amounts to "probationary status" and may be subject to compliance reviews to be conducted at the discretion of EPA. Despite EPA's own rejection of the complaint, the exonerated recipient (and potential industrial facility) retains the moniker of a suspect subject to one or more compliance reviews (or investigations).

In effect, the "vindicated recipient" would receive greater scrutiny than other recipients who are not the subject of complaints, tantamount to remaining under an air of suspicion. EPA continues to deal with a backlog of complaints, some of which remain unresolved several years after filing, EPA resources would be better utilized for resolving this backlog, rather than targeting for compliance reviews, those recipients for whom EPA has already formally determined are in compliance with Title VI requirement.

Recommendation: Thus, EPA should not seek to conduct compliance reviews where a complaint has been dismissed based on decrease stressor levels. EPA should only conduct such compliance reviews based on random checks of all permitted facilities and not based on a list of exonerated recipients of previously dismissed Title VI complaints. This ensures that recipients are not unfairly singled out solely on the basis of being party to dismissed Title VI complaints.

9. **Informal resolution resulting in settlement agreements should not include penalties.**

In implementing informal resolutions, EPA proposes that settlement agreements include the impact reduction measurers which would be monitored and enforced by EPA and also include penalties for noncompliance, including special conditions on future assistance grants. [Discussed in Section IVA(2)]

Issue: Through the Draft Guidance, EPA has wisely decided to pursue informal resolution between the parties prior to engaging in the lengthy and contentious investigation process. However, as proposed in the Draft Guidance, any settlement agreements reached pursuant to informal resolutions would potentially contain penalties, notwithstanding the fact that there has been no formal finding of a Title VI violation on the part of the recipient.

Recommendation: Thus, EPA should not include penalties when informally resolving complaints with recipients, especially where no investigation has been conducted that provides evidence that any adverse disparate impact exists. The complaint process already allows for EPA to reopen complaints for failure to comply with commitments in the settlement agreement.

10. **EPA should not act on its own to determine impacts or stressors where the complaint is unclear**.

EPA proposes to rely on the complaint to determine the nature of the impacts or stressors. However, if the complaint fails to identify them, EPA will rely on its expertise to determine them. [Discussed in VIB(2)(b)].

Issue: Relying on its expertise to determine applicable impacts or stressors could result in a fishing expedition by EPA requiring discovery of a irrelevant information. Potential complainants could use this loophole to present open-ended complaints that purposely contain insufficient supporting data, thus forcing EPA to conduct blind fishing expeditions in the hopes that it would uncover potential violations during the review.

Additionally, it is not the role of EPA's Office of Civil Rights to provide the parties with technical assistance in an effort to establish a theoretical cause for a complaint, but rather to investigate and resolve allegations of Title VI violations. To exercise such responsibility where the complaint is unclear casts a cloud over the impartiality of EPA's role in the process. As has been previously noted, EPA's resources are currently overextended and this additional function would serve to further extend the backlog of Title VI complaints waiting to be resolved.

Recommendation: As a result, EPA should not act sua sponte to determine the stressors alleged in the complaint, but rather issue a formal letter to complainant requesting clarification of the potential stressors which are of potential concern. This allows EPA to

accomplish its responsibilities in an independent and objective manner and allows the parties to continue to maintain confidence in the impartiality of the process.

11. **EPA should not consider unregulated sources in an adverse impact study.**

In defining the scope of its investigation, EPA proposes to consider the cumulative impacts of regulated and unregulated sources together to determine the cumulative level of potential adverse impacts. [Discussed in Section VIB(2)(b)].

Issue: EPA's consideration of cumulative impacts from regulated sources when evaluating adverse impacts is one issue that has recently received greater attention. However, EPA should not consider unregulated sources in the determination of whether an adverse impact exists. First, because recipients have no authority over unregulated sources of pollution, they should not be held responsible for any adverse effects that these sources may impose on receptors; therefore, unregulated sources should be excluded from consideration in determining adverse impacts. Title VI, through the equal protection clause, is limited to governmental actions, and does not extend to private actions. EPA cannot claim it needs to consider effects of unregulated health risks in order to fulfill its equal administration of the potential health risks its regulates. The government's responsibility - and the Title VI claim - can only reach to the end of the government's authority.

In addition, consideration of unregulated sources is very misleading because they are not always identifiable. The data necessary to conduct this assessment is not available and or fundamentally unknown. Collecting the available data is costly and time-consuming. Since some of the data necessary to perform this assessment is unknown, any assessment would be inherently biased.

Next, the government has no standard to weigh data and analyses of unregulated sources. To make decisions on permit information, the government has standards for data quality and best practices for risk assessments. These standards and practices are uniform to ensure fairness and public review. Data from unregulated sources is likely not to comport with these quality standards. If people are exposed to benzene from two chemical plants, 45 nearby automobiles and charcoal grills, the best data is most likely to be from the chemical plants. The inherent bias discussed above inevitably goes against the source with the most data. Before preparing these assessments, the data quality and reliability must be calibrated.

Recommendation: The adverse impact determination of the final Guidance should not include a study and consideration of unregulated sources to determine whether a cumulative adverse impact exists.

OTHER ISSUES FOR CLARIFICATION

12. **EPA should not refer complaints to other agencies where it lacks jurisdiction over an allegation or issue contained therein.**

During the "Acceptance Phase" of the Complaint process, EPA would make a determination of whether to accept for investigation, reject, or refer the complaint to that federal agency with jurisdiction over or is better equipped to handle the issues and allegations raised in the complaint. [Discussed in Sections IIA(2) and IIIA].

The Issue: Referral of complaints directly to another agency poses concerns for both the complainant and recipient involving full and complete resolution of all issues in a timely manner. First, the receiving agency of the referred complaint may have unique authority for resolving related issues not contained in the original complaint. Complainant is precluded from ensuring that the complaint referred to the receiving agency contains those additional issues that may be resolved as well.

Second, recipients cannot be assured of timely resolution of all issues related to a complaint when complainant must wait for notification of acceptance by the receiving agency prior to potential amendment of the complaint to raise issues unique to that agency.

Recommendation: EPA should return without prejudice to complainant those allegations for which it lacks jurisdiction. First, complainant may have additional concerns or issues related to the allegation which can be appropriately considered and addressed by the federal agency, but which was inappropriate for consideration by EPA based on the limits of its authority. Thus, it ensures that all issues and concerns are completely explored and addressed early in the process and it avoids time delays resulting from amended complaints, information requests, etc.

Additionally, EPA returning complaints to complainant allows EPA to conserve resources and redirect them to investigation of the numerous other complaints that EPA has and continues to receive.

Thus, It would be in the best interest of the parties for EPA to reject without prejudice any allegation(s) for which EPA lacks jurisdiction with proper notification to the parties for its reason(s) and to inform them of the federal agency having proper jurisdiction over the matter.

13. **The Guidance does not clearly establish that the rebuttable presumption rule as applied to regulatory compliance is applicable to all media programs.**

EPA states that "compliance with environmental laws does not constitute per se compliance with Title VI," but could establish a rebuttable presumption. [Discussed in Sections VIB(4)]

Issue: During the Public Listening Sessions held in Washington, DC and Dallas, TX, the Director of EPA's Office of Civil Rights (Director), responding to public inquiry, stated that EPA's Select Steel decision did not establish that compliance with environmental laws and regulations established a per se rule of Title VI compliance, but rather established a rebuttable presumption of Title VI compliance. (Which presumption could be overcome through the presentation of sufficient countervailing evidence). This rebuttable presumption rule was not expressly discussed in the Select Steel decision, but rather implicit in that decision.

The Draft Guidance embarks on a discussion of the rebuttable presumption rule in the context of environmental compliance. The Draft Guidance discusses the rule mainly in the context of air quality issues; however, its application in other media programs remains unclear until the very end.

Recommendation: EPA should provide a clear statement in the beginning of its discussion on this topic declaring that the rebuttable presumption rule is applicable in the context of all multimedia programs. Thus, compliance with environmental laws and regulations in the respective media program(s) that are the subject of dispute in the complaint would establish a rebuttable presumption of Title VI compliance.

14. **The Guidance does not clarify the establishment of the rebuttable presumption upon a finding of compliance with pre-existing obligations under area specific agreements.**

EPA encourages the use of area specific agreements between recipients and impacted communities proactively to resolve disparate impact issues. EPA proposes, to grant due weight to these agreements under certain circumstances. However, EPA notes that it may not accord due weight in certain circumstances where the recipient is complying with pre-existing legal obligations. [Discussed in Section IVB(5)b(2)].

Issue: As noted in the previous comment, EPA should find that where recipients are in compliance with environmental laws and regulations a rebuttable presumption has been established that no adverse disparate impact exists. However, the Draft Guidance is unclear whether the rebuttable presumption rule is applicable where EPA finds that the recipient has complied with pre-existing legal obligations, although no additional supplemental obligations have been undertaken under the area specific agreement.

Recommendation: The final Investigative Guidance should clarify that where recipients are in compliance with environmental laws and regulations a rebuttable presumption has been established that no adverse disparate impact exists.

15. **EPA should not use the Shintech demographic analyses as models for conducting disparity comparison assessments.**

EPA, in its disparity comparison assessments, proposes to use demographic information obtained from Shintech's Proposed Facility in St. James Parish, LA. [Discussed in the Draft Investigative Guidance, Section VIB(5)(b)].

Issue: The methodology used by EPA in the Shintech St. James Project provides inaccurate information when conducting demographic analyses. The data that EPA relied upon in its analyses were based on demographic figures from the 1990 census. Those figures fail to specifically identify where minorities reside within a given community. As a result, they figures can only provide approximations of an adverse environmental impact on a community or minority population. Shintech was able to obtain a more accurate data accounting for local demographics which was collected and used during the permitting process.

Additionally, EPA never resolved the Title VI complaint against the Louisiana Department of Environmental Quality involving Shintech's Part 70 Operating Permit for a new facility in St. James Parish, La. Because the complaint has not been resolved, the EPA demographic analysis in the Shintech case provides no precedential value as a model for future adverse impact analyses. Although an analysis may have been conducted, it was not utilized to resolve any Title VI issues in the St. James Project and therefore its acceptance and effectiveness has not withstood scrutiny by the various parties. A related concern, is reference to the Shintech name where the Title VI complaint remains unresolved. The company's name should not be referenced until final resolution or rejection of the complaint.

Recommendation: The Draft Guidance should not include reference EPA's demographic analysis involving the Shintech St. James Project. The methodology is the not the most effective in determining demographic analysis in potentially impacted areas. Second, because the Title VI complaint against the Shintech Permit has not been resolved, the analysis conducted pursuant to the investigation is of no precedential value for use in future analysis.